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Nos. 183, 186, 187

In the Supreme Court of the United States

OCTOBER TERM, 1942

THOMAS J. PENDERGAST, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT EMMET O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

A. L. MCCORMACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

PRELIMINARY STATEMENT

The Solicitor General authorizes the filing of the following brief in opposition, prepared by counsel

appointed[1] by the three-judge court for prosecution of the contempt proceedings at trial and for representation of the United States in the event of appellate proceedings.

CHARLES FAHY,
Solicitor General.

AUGUST 1942.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1188) is reported in 128 F. (2d) 676. The opinions of the District Court (R. 21, 50) are reported in 35 F. Supp. 593, and 39 F. Supp. 189.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 1, 1942 (R. 1212–1214). The petitions for certiorari were filed on June 27 and 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Were petitioners guilty of criminal contempt by misbehavior in the presence of the court, within the meaning of Section 268 of Judicial Code, 28 U. S. C., Sec. 385?

2. Is the proceeding for contempt barred by the three-year statute of limitations or by laches?

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[1] See Statement Opposing Jurisdiction and Motion to Dismiss, *Pendergast* et al. v. *United States*, Nos. 568–569, October Term, 1941, pp. 1–2 (order appointing counsel).

3. Is the proceeding for contempt barred by an alleged agreement of the District Attorney not to prosecute?

4. Did the District Court have jurisdiction to entertain the contempt proceeding?

STATUTES INVOLVED

Section 268 of Judicial Code, 28 U. S. C., Sec. 385, provides, in part, as follows:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * *.

Section 1044 of Revised Statutes as amended, 18 U. S. C., Sec. 582, provides as follows:

> No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

STATEMENT

Petitioners omit many pertinent facts. A full statement of the case is therefore required. Petitioners were found guilty of criminal contempt by

the District Court of the United States for the Western District of Missouri (R. 65–66). The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188). The petitions for certiorari and briefs filed here by Pendergast and O'Malley are substantially identical; and McCormack in effect adopts them, except their Point III.

The contempt consisted in fraudulently foisting upon the District Court a corrupt settlement of certain insurance rate litigation, procured through bribery of the Missouri Superintendent of Insurance. Petitioners caused counsel in open court to represent the settlement to the court as a bona fide settlement by antagonistic litigants; they thereby intended to and did deceive the court, and obtained decrees from the court carrying the settlement into effect. Petitioners thus committed a fraud on the court by false representations in its presence. Petitioners thereby intended to deprive hundreds of thousands of Missouri policyholders of their day in court and opportunity to establish their right to about $10,000,000 of premiums impounded in custody of the court. This colossal fraud upon the policyholders failed only because the District Court later discovered it and set aside the decrees. (R. 51–53, 1189–1193.)

There were four conspirators involved: one Charles R. Street (now deceased), an insurance company executive, who was in charge of the rate litigation for the insurance companies; petitioner

Pendergast, a political boss with almost dictatorial power, residing in Kansas City, Missouri; petitioner O'Malley, a creature of Pendergast, who as Superintendent of the Missouri Insurance Department was the defendant in the insurance rate cases; and petitioner McCormack, an insurance agent residing in St. Louis, Missouri (R. 51–52, 653, 1189).

Each of the four conspirators played a distinct part in the plot. Street, representing the plaintiff insurance companies (R. 700, 651, 653), hired Pendergast to use his political power and control over Superintendent O'Malley (R. 704–705, 654, 52, 1189), and to bribe O'Malley (R. 709–710, 713–715, 663, 52, 1189), to agree to a settlement of the insurance rate cases satisfactory to the insurance companies (R. 704, 654); Street agreed to pay Pendergast a "fee" of $750,000 to accomplish this result (R. 705–706, 631, 654, 1123, 52, 1189), of which he paid $440,000 to Pendergast on account (R. 706–709, 711–712, 716–717).

Petitioner Pendergast through his domination and control of O'Malley, and by payment of $62,500 as a bribe to O'Malley (R. 709–710, 713–716, 782–785, 1123–1125, 52), caused O'Malley to agree to a "settlement" whereby the insurance companies would receive 80 per cent or about $8,000,000 of the impounded premiums, and the policyholders would be stripped of their opportunity to try the cases and establish their right to the $10,000,000 fund (R. 724–725, 890–894, 1118, 52, 1189).

Petitioner O'Malley as Superintendent of Insurance, and as defendant in the cases, accepted the bribe (R. 709–710, 714–715), and in consideration thereof (R. 632) betrayed the interests of the policyholders whom he represented, by corruptly agreeing to a settlement "satisfactory" to his adversary, Street (R. 704, 890–894, 654).

Street and petitioner O'Malley, in furtherance of the conspiracy, caused their respective counsel, representing the parties in the rate cases, to appear in open court and, by representations there made, to induce the District Court to enter decrees carrying the corrupt settlement into effect (R. 891–892, 633, 984, 985, 987, 988, 990, 1006, 963, 968, 969, 971, 974, 976–977).

Petitioner McCormack, as go-between, carried installments of cash, aggregating $440,000, from Street to Pendergast (R. 706–709, 711–712, 716–717); carried $62,500 of this cash as a bribe from Pendergast to O'Malley (R. 709–710, 713–715); at O'Malley's request he secreted the bribe money in a safe deposit box in St. Louis, and from time to time at O'Malley's request delivered the cash to O'Malley (R. 709–710, 713–715); and subsequently, when testifying as a witness before a federal grand jury, at O'Malley's request (R. 719, 721–722) he attempted by perjury to protect the conspirators from exposure by suppressing his knowledge of the corruption (R. 718).

The material facts, arranged in chronological order, are as follows:

The insurance companies on December 30, 1929, had filed with the then Superintendent of Insurance an increase of 16⅔ per cent in insurance rates (R. 373–374, 413, 443–444, 498–500, 646), which the Superintendent on May 28, 1930, had denied (R. 417–418, 446). The insurance companies instituted in the District Court 137 separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri (R. 363–364), in which they prayed interlocutory and permanent injunctions suspending or restraining the enforcement of certain statutes of Missouri, by restraining the action of those state officials in the enforcement of the statutes and in the enforcement of the Superintendent's order of disapproval of the increase in rates made pursuant to said statutes, upon the ground of the unconstitutionality of the statutes (R. 382–399, 404–407, 408–409, 409–412, 420–421, 432, 436–437, 460–470, 472–475, 485–487, 490–491, 492–494, 494–497). The statutes thus attacked were Sections 6270, 6274, 6281, 6287, and 6311 R. S. Mo. 1919, and Section 6283 R. S. Mo. 1919, as amended, Laws of Missouri 1923, p. 234. (These statutes are copied in the appendix.)

A three-judge court was accordingly convened. Section 266 of Judicial Code, 28 U. S. C., Sec. 380. The applications for interlocutory injunctions were presented to and granted by said court (R. 501–

508), and the Superintendent and Attorney General were thereby enjoined, pending final decision of the cases, from enforcing the statutes (R. 503, 504), upon condition that the insurance companies deposit the amount of the increase in rates with a custodian of the court to await ultimate decision of the cases (R. 505–508). A special master was appointed to take the evidence and report it to the court (R. 602).

In the spring of 1935, and before determination of any of the suits, O'Malley, through McCormack as go-between, suggested to Street that he talk with Pendergast about a settlement of the cases (R. 699, 700, 651, 653, 654). Pendergast was a powerful political boss in Missouri; but he was not a lawyer (R. 653) or a party to the insurance cases (R. 365, 416, 435), and could have no legitimate connection with those cases. Street was willing to meet Pendergast (R. 702, 654), and O'Malley arranged a time for them to meet in Chicago (R. 702, 703, 654). At this meeting Street, McCormack and Pendergast were present (R. 703). Pendergast was there, not to discuss settlement of the rate cases, but to convince Street that he could control O'Malley, and to obtain from Street an agreement to pay him for doing so (R. 704, 654). Street agreed to pay a "fee" of $500,000 if a "satisfactory settlement" could be obtained (R. 704, 654). This was later raised to $750,000 (R. 705–706, 631, 654). Pendergast said he "would see what he could do about it"

(R. 705), and later reported that he was "working on the matter" (R. 706).

Street sent McCormack to Pendergast with $100,000 in currency, which was divided, $55,000 to Pendergast, $22,500 to O'Malley and $22,500 to McCormack (R. 706–710). O'Malley knew the payment to him was for the "settlement" he was to make (R. 632).

Thereafter on May 18, 1935, Street and O'Malley, accompanied by their respective attorneys, had a conference at the Hotel Muehlebach in Kansas City, and there discussed the "details of what could be done with reference to bringing about the settlement agreement" (R. 724, 662). They agreed to divide the impounded premiums, 80 per cent to the insurance companies and 20 per cent to the policyholders (R. 725, 891–892). They made and signed a written memorandum of agreement (R. 890–894, 1118), which provided that O'Malley as Superintendent would approve 80 per cent of the increase in rates sought by the insurance companies (R. 891); "that the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money," 20 per cent to the policyholders, 50 per cent directly to the insurance companies and 30 per cent to Charles R. Street and Robert J. Folonie as trustees for the insurance

companies (R. 891–892).[2] These trustees were to account therefor to the companies, but not to the court or Superintendent (R. 892). The agreement provided that the insurance companies would "take the appropriate means to present to the courts in which proceedings are pending" the agreement of settlement; that O'Malley as Superintendent would "appropriately confess the same and consent to decrees for distribution of impounded moneys" (R. 892–893); and that the companies and O'Malley would "mutually undertake to join in seeking orders or decrees confirming their agreement" (R. 893). To effectuate the settlement it was necessary to obtain decrees of the court directing distribution of the impounded funds (R. 632, 680).

On June 18, 1935, the insurance companies accordingly filed, in each case pending in the District Court, a motion reciting terms of settlement and praying an order of distribution in accordance therewith (R. 603–606, 663). On the following day the insurance companies and O'Malley filed in each case a stipulation agreeing that the District Court should make such order of distribution (R. 607–609). The written memorandum of May 18th was never shown to the court (R. 680).

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[2] Companion litigation was pending in the Circuit Court of Cole County, Missouri, instituted by other insurance companies than those which had sued in the District Court; and this explains the reference to the state court in the settlement agreement.

On June 22 and October 26, 1935, and on January 24, 1936, hearings in open court were had on the foregoing motions (R. 937–959, 978–1008, 1030–1045); and briefs were filed by counsel for the insurance companies (R. 965–966, 1008–1029) and by counsel for O'Malley (R. 960–964, 967–977). At these hearings, and in these briefs, the District Court was urged to order distribution of the impounded funds in accordance with the motion and stipulation. The court was assured that the settlement had been made in good faith at arm's length (R. 633), and that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987); that the settlement was "a fair one" for the policyholders (R. 969, 976); that the insurance companies had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of" (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976–967), whose representative or trustee he was (R. 963, 974).

At the hearing in open court on October 26, 1935, counsel for O'Malley assured the court that the settlement was "a good settlement" (R. 990), "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and that it was "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). They informed the court that O'Malley had

specifically requested that his counsel "show this Court the motives" which had inspired him to make the settlement (R. 984); that he had driven "as hard a bargain" as he could (R. 987), and had made "a settlement which he thinks is clean, fine, and decent" (R. 987).

In fairness to counsel, let it be here stated that the District Court found that they were ignorant of the corruption and fraud which had brought about the settlement (R. 52).

On February 1, 1936, the District Court, in reliance upon these representations made in open court (R. 52, 633, 680), entered in each of the insurance cases a decree ordering distribution of the impounded funds as prayed in the motions (R. 617–624). By the decrees the court dismissed the cases (R. 617), but reserved jurisdiction to make "further orders in aid of distribution of impounded moneys" and "for all purposes" of effectuating the decrees (R. 623).

When these decrees were entered the impounded funds aggregated $9,902,158.03 (R. 733). These funds were then "in suspended control of the court to await the ultimate determination of whether such funds belonged to the companies or to the policyholders" (R. 679). The decrees disposed of the impounded funds without any trial of the merits (R. 680).

The court was thus deceived and imposed upon by the false presentation of the character of the

settlement; and was made an innocent instrument in perpetrating a fraud upon the interested policyholders by giving effect to a settlement agreement procured by bribery of their trustee, O'Malley (R. 633).

It appears that the "settlement" was regarded by Street as "satisfactory" and accordingly further payments to Pendergast and O'Malley were resumed. About April 1, 1936, Street gave McCormack $330,000 in currency, which McCormack carried from Chicago to Pendergast's home in Kansas City in a suitcase (R. 711–712, 663). The money was there laid out on a table and counted (R. 712). Pendergast took $250,000 of it, and gave back $80,000 to McCormack (R. 712), saying for McCormack to "take half, to give half of it to Emmett" (R. 713–714, 663). McCormack took the $80,000 to St. Louis, and put it in his safe deposit box (R. 713). Asked why he did this, McCormack explained that "half of it was to go to Mr. O'Malley and he was out of town at the time" (R. 713). McCormack reported to O'Malley that he had the money in the safe deposit box (R. 714). On April 9, 1936, O'Malley asked for "his $40,000," and McCormack delivered it to him, in cash (R. 714–715). About six months later, at O'Malley's suggestion, Street sent another $10,000 in cash to Pendergast (R. 716–717, 1123). This was in October or November 1936 (R. 782–785, 1123–1124, 1125).

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Thus the $440,000 paid by Street on account was divided among petitioners, $62,500 to O'Malley, $62,500 to McCormack, and $315,000 to Pendergast. There only remained to be completed the distribution of the impounded $10,000,000, whereupon petitioners would collect the $310,000 balance of the $750,000 "fee."

Here, three unexpected developments intervened to upset the conspirators' plans. First, because of the huge number of policy transactions involved, the distribution of the impounded fund took many months of time; and, indeed, it never was fully completed (R. 735, 780). Second, Street died on February 1, 1938 (R. 1049); and since his agreement with Pendergast was entirely oral, this seriously complicated the conspirators' plans. Third, and most serious of all, an investigation by the Commissioner of Internal Revenue on Street's income tax returns uncovered the $440,000 corruption fund which had passed through his hands (R. 1051–1052), and this finding was reported to the District Court on February 8, 1939 (R. 1046–1048).

In February and March, 1939 McCormack was called several times as a witness before a federal grand jury which was investigating the matter (R. 717–719). During his attendance O'Malley met with him three or four times, late at night, and urgently importuned him to conceal the bribery from the grand jury (R. 719, 720, 721, 722). McCormack on three or four appearances concealed

the bribery (R. 718); but finally disclosed the truth to the grand jury on March 17, 1939 (R. 719, 731). Until that time he had kept the bribery secret from everybody, except his co-conspirators, since the plot was hatched (R. 732).

On May 29, 1939, Superintendent of Insurance Lucas (O'Malley's successor) filed a motion in the insurance rate cases setting up the bribery and praying that the decrees of February 1, 1936, be set aside, and that the insurance companies be ordered to restore to the custody of the court the impounded funds which had been distributed to them (R. 747-755). This was the first notice of the alleged fraud given to the court. The court at once made an order of restitution (R. 633, 692, 1061, 756–758), in accordance with which the companies restored the money they had received under the decrees (R. 734, 735, 781).

At the conclusion of the hearing on May 29, 1939, the District Court called to the attention of the District Attorney the question whether contempt proceedings should be filed (R. 1062). After evidence as to the corrupt settlement was taken, and was presented to the court at a hearing on May 20, 1940, the District Court requested the Acting United States Attorney, as amicus curiae (R. 75), to institute a contempt proceeding against petitioners, and any others if the evidence justified joining any others (R. 1077). The information was filed on July 13, 1940 (R. 1–9), and a rule to show cause

was issued and served (R. 9–10). Motions to abate and quash the information were filed, heard and overruled (R. 10–20, 31; 35 F. Supp. 593). Answers were thereupon filed (R. 33–49).

At the trial the government introduced the Street-O'Malley agreement of May 18, 1935 (R. 625–626, 890–894), and pertinent parts of records from the insurance rate cases (R. 362–693, 732–736, 740–779, 780–781). McCormack testified as a government witness and related the transactions between himself, O'Malley, Street, and Pendergast, as they are above outlined (R. 694–725). Petitioners declined to make opening statements (R. 625), and offered no witnesses. Their evidence consisted of court records in collateral criminal proceedings, wherein they were indicted for conspiracy to obstruct justice (R. 821–829) and to interfere with functions of the Judiciary Department by fraud (R. 830–836) through the procurement of the decrees of February 1, 1936; and a transcript of proceedings upon their pleas and motions in those cases (R. 839–857, 868–875). In these latter cases the District Attorney had entered a nolle prosequi because of an agreement he had made respecting indictments of Pendergast and O'Malley (for evasion of income tax on the money received from Street) to the effect that if Pendergast and O'Malley entered pleas of guilty in the tax evasion cases "the Government would not prosecute them for any other offense growing out of these same transactions" (R. 852–854, 857–858).

Petitioners were found guilty. An opinion, findings of fact, and conclusion of law were filed (R. 50–65), and are reported in 39 F. Supp. 189. Pendergast and O'Malley were sentenced to two years' imprisonment and McCormack was sentenced to probation for two years (R. 66). On June 4, 1942, the Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188–1206, 1213–1215).

SUMMARY OF ARGUMENT

I

When petitioners by fraud induced the District Court by its decrees to carry into effect the corrupt settlement of the insurance rate litigation based on bribery, they committed a "contempt of the authority" of that court. When petitioners through innocent counsel in open court represented to the court that the settlement, which petitioners knew to be corrupt, was one made by antagonistic litigants in negotiations at arm's length, they were guilty of "misbehavior in the presence of the court." The misbehavior did not merely take effect in open court, but occurred there. The false representations of counsel were representations by petitioners, who sent counsel there to make them. Petitioners, having caused counsel to make the false representations in open court, are responsible as if personally present there. The false representations were the representations of Pendergast and

McCormack as well as those of O'Malley, because uttered in furtherance of the conspiracy to which all three were parties, and because the overt act of one was the act of all. Hence petitioners were guilty of misbehavior in the presence of the court; and the court had power under Section 268, Judicial Code, 28 U. S. C., Sec. 385, to punish them for contempt. The facts in *Nye* v. *United States*, 313 U. S. 33, clearly distinguish that case from this. Any interruption of the orderly conduct of a federal court's business or of the normal progress of litigation therein, whether by noise and disorder, or by false statements in open court intended to affect pending litigation, is punishable contempt under the statute.

II

Limitation on the time of beginning the prosecution of a crime is purely a matter of statute. There is no statutory limitation specifically applicable to a criminal contempt committed in the presence of the court; and unless the delay in instituting such a contempt proceeding is unreasonable and prejudicial to defendants, the proceeding is not barred by lapse of time. The decision in *Gompers* v. *United States*, 233 U. S. 604, 606, is on its face inapplicable to a criminal contempt committed in the presence of the court, such as here.

Assuming the three-year statute to be applicable, it had not run when the contempt proceeding began. Jurisdiction to punish petitioners for con-

tempt continued until the trials of the insurance rate cases were finally terminated. The information here was filed before entry of final decree therein. Also, petitioners were guilty of a continuing conspiracy, in furtherance of which overt acts were committed by petitioners both in and out of court, all being parts of one continuing conspiracy and contempt. Petitioners' conspiracy and contempt are analogous to a conspiracy effected by overt acts in different venues, which conspiracy is deemed in law to have been carried out in each venue where any overt act was committed. The last of petitioners' overt acts were committed only 16 months before the information was filed. Hence, in any view the three-year statute had not run. The defense of laches is untenable because the information was filed within a reasonable time after the court discovered the contempt, and because petitioners were in no manner prejudiced by delay.

III

Neither Judge Otis, who sentenced Pendergast and O'Malley for tax evasion, nor the District Attorney himself understood that the District Attorney had agreed not to prosecute Pendergast and O'Malley for contempt in the presence of the three-judge court. Such an agreement would have been wholly beyond the lawful power of the District Attorney, as petitioners are held to have known; for the court contemned, and not the District At-

torney, was charged with the power to punish petitioners for contempt, in its own proceeding and independent of any other official or tribunal. The three-judge court never heard of an agreement of any kind until it was claimed as a defense at the trial of the contempt proceeding. Petitioners' contention is therefore not supported either by the law or the facts.

IV

The insurance rate cases were three-judge cases. The three-judge court therefore had jurisdiction to grant the interlocutory injunctions, and to grant the same upon condition that the insurance companies impound the amount of premiums in dispute. Jurisdiction to require the impounding necessarily vested the court with jurisdiction to distribute the impounded funds to those entitled thereto; and the decrees of distribution (which petitioners fraudulently procured) were within its jurisdiction. The three-judge court—the only court contemned—therefore had inherent jurisdiction to punish petitioners for contempt in fraudulently procuring those decrees. As a duly constituted court of the United States it also had such power by express statutory grant (Sec. 268, Judicial Code, 28 U. S. C., Sec. 385). But even if the contempt proceeding should have been heard by the single judge before whom the insurance litigation originated, the participation in the hearing by the

two other judges did not invalidate the District Court's judgment, since the judgment and each ruling made by the court embodied the unanimous decision of the three judges.

ARGUMENT

Before replying to petitioners' points, we note the fact that petitioners make no pretense of innocence. The corrupt conspiracy is not denied. The bribery of O'Malley, and his betrayal of public trust by selling out hundreds of thousands of policyholders, is not denied. That in furtherance of the conspiracy false representations were made to the District Court, in open court, regarding the settlement, is not denied. That petitioners thereby deceived the court and secured from the court decrees approving the corrupt settlement and distributing nearly $8,000,000 of impounded premiums to the insurance companies and their representatives, to the exclusion of the right of the policyholders to have the court determine the ownership of the fund, is not denied. That the rights of the policyholders would have been finally foreclosed had not the fraud perpetrated upon the court been discovered and the decrees set aside, is not denied.

The amazing story of corruption and fraud is conclusively proved by the testimony of petitioner McCormack and the indisputable court records. Petitioners Pendergast and O'Malley stood mute.

The opinion in the District Court properly char-

acterized the conspirators' conduct as "the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us" (R. 50). The conspirators did more than obstruct justice; with callous disregard for the consequences, they exposed honorable judges to the possibility of loss of public confidence, and even disgrace.

I

PETITIONERS ARE GUILTY OF MISBEHAVIOR "IN THE PRESENCE OF THE COURT," WITHIN THE MEANING OF SECTION 268, JUDICIAL CODE (28 U. S. C., SEC. 385); THEIR CONTEMPT OF COURT IS PUNISHABLE UPON INFORMATION; AND THE OPINION OF THE CIRCUIT COURT OF APPEALS IN SO HOLDING IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OR WITH ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER

Petitioners contend that the District Court could not punish them for contempt (a) because they were not personally present in the courtroom when the fraud was perpetrated upon the court, and (b) because there was no noise or disorder in the courtroom disturbing the court in the conduct of its business.

Petitioners (at p. 29 of brief) treat the misbehavior as having occurred only at the meeting in Chicago between Street, Pendergast, and McCormack, where the conspiracy began; at Pendergast's office and home in Kansas City, where the $440,000 in cash was delivered to Pendergast; at St. Louis, where the bribe payments were delivered to O'Malley; and at the meeting between Street, O'Malley,

and McCormack at the Muehlebach Hotel in Kansas City, where the settlement agreement was written. Petitioners blandly ignore the fact that all of these preliminaries (outside the presence of the court) were mere *preparation* for the fraud to be perpetrated on the court by false representations *in its presence.* It is submitted that petitioners' contention is wholly without substance, for the reasons which follow.

First. The power of the District Court to punish for contempt is controlled by Section 268 Judicial Code, 28 U. S. C., Sec. 385, which provides:

> The courts of the United States *shall have power* * * * *to punish,* by fine or imprisonment, at the discretion of the court, *contempts of their authority.* Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person *in their presence,* or so near thereto as to obstruct the administration of justice, * * * [Italics supplied.]

When petitioners invoked and used judicial power to aid them in the perpetration of an $8,000,000 fraud, certainly they committed a "contempt of the authority" of the court. And when petitioners through innocent counsel assured the court that the settlement, which petitioners knew to be polluted with bribery and corruption, had been made at arm's length and was "the cleanest, the most decent, and the finest settlement ever made

in Missouri," it is mild understatement to say that petitioners were guilty of "misbehavior." Undeniably, that misbehavior occurred in the presence of the court. The statute, by its express terms, authorizes punishment of petitioners for contempt of court.

The misbehavior did not merely "take effect" in the presence of the court, as petitioners repeatedly argue throughout their briefs. The misbehavior *occurred* in the presence of the court.

Second. It makes no difference that petitioners were not personally present in the courtroom when the false representations were made to the court. The false representations of counsel were in law the representations of petitioners, because *petitioners sent counsel there to make them.*

In *Cooke* v. *United States,* 267 U. S. 517, Cooke sent a messenger with an insulting and contemptuous letter to the District Judge in his chambers adjoining the court-room, during a ten-minute recess in a trial (p. 519). The messenger there delivered the letter to the District Judge. Although Cooke does not appear to have been present when the letter was delivered, this court nevertheless unanimously held that Cooke was subject to punishment for contempt, even though what was done "in the presence of the court" was done, not by Cooke personally, but by Cooke's messenger at Cooke's direction. This is exactly what Pendergast, Street, O'Malley, and McCormack did; they sent messen-

gers of the highest authority—counsel of record—into open court to deliver the false representations.

In *Sinclair* v. *United States*, 279 U. S. 749, Sinclair caused jurors, throughout the progress of a trial, to be systematically shadowed by a corps of private detectives. The shadowing was done within the court-room, near the door of the court house, and at other points within the city (p. 765). Although Sinclair did not personally do any of the shadowing, this court nevertheless unanimously held that he was guilty of criminal contempt because he had caused it to be done. This is exactly analogous to the situation in the case at bar—these conspirators caused counsel to appear in open court to deliver the false representations for them.

There is nothing new in the application of this principle to the facts here. The principle is an old one. In *United States* v. *Gooding*, 12 Wheat. 460, 469, Justice Story said that—

> * * *. It is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, *and the act is his act.* [Italics supplied.]

In *Commonwealth* v. *White*, 123 Mass. 430, 433–434, the court said:

> * * * But it is not uncommon under the criminal law that a man may commit a crime *without being personally present.* * * * We think the maxim, qui facit per

alium facit per se, applies, and that he was liable, criminally as well as civilly, for the acts of his agent *to the same extent as if done by him in person.* [Italics supplied.]

In *State* v. *Barnett,* 15 Ore. 77, 81–82, 14 Pac. 737, 739, the court said:

> * * * In judgment of the law, he who procures the act to be done *is present at its commission,* and will not be permitted to deny that he personally committed it *at the place where it was done.* In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been *personally present.* [Italics supplied.]

In *People* v. *Adams,* 3 Denio 190, 210, the court said:

> * * * He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but *he was here in purpose and design,* and acted by his authorized agents. * * * The agents employed were innocent, *and he alone was guilty.* [Italics supplied.]

In *People* v. *Keller,* 79 Cal. App. 612, 617, 250 Pac. 585, 586–587, the court said:

> * * * It is well settled that one who causes a crime to be committed through the instrumentality of an innocent agent is the principal in the crime *and punishable accordingly, although he was not present* at the

> time and place of the offense. * * *
> [Italics supplied.]

To the same effect are *Merritt* v. *United States,* 264 Fed. 870, 875 (C. C. A. 9); *Beausoliel* v. *United States,* 107 F. (2d) 292, 297 (App. D. C.); *Barkhamsted* v. *Parsons,* 3 Conn. 1, 8; *Simpson* v. *State of Georgia,* 92 Ga. 41, 17 S. E. 984, 985; *Welch* v. *State of Georgia,* 49 Ga. App. 380, 175 S. E. 598, 602; *Girdley* v. *State of Tennessee,* 161 Tenn. 177, 29 S. W. (2d) 255, 256–257; *State* v. *Faggard,* 25 New Mex. 76, 177 Pac. 748, 750; 22 Corpus Juris Secundum 151.

We need not rely merely on inference, because the record contains *direct proof* that the petitioners caused counsel to make the false representations in court. This case is probably unique in the fact that conspirators, secretly planning a fraud upon a court, expressed *in writing* their intention to consummate the conspiracy *in the presence of the court.* We refer to the written agreement of May 18, 1935 (R. 890–894).

On May 18, 1935, O'Malley (recipient of a preliminary bribe of $22,500 on account, with more to follow) met with Street, his ostensible adversary. McCormack was also present. Pendergast was not present in person. He did not need to be. He had made a deal with Street to bring about the result (R. 703–705, 654); he had been "working on the matter" (R. 706); he had received payments on account and bribed O'Malley (R. 707–710, 662).

Pendergast had bought O'Malley; he knew that O'Malley would stay bought and that Street, O'Malley and McCormack were entirely competent to work out the details of the fraud upon the court.

At this conference Street and O'Malley agreed upon a division of the impounded fund, 80 per cent to the insurance companies and 20 per cent to the policyholders (R. 725, 891–892). Then they set about to devise a plan which would bring about *actual distribution* of the impounded millions, then in custody of the District Court (R. 505–508) awaiting final decision of the cases on their merits (R. 679–680). They worked out a plan, and embodied it in the agreement of May 18, 1935, which Street and O'Malley signed (R. 890–894). It provided for distribution on the 80–20 basis, and then provided (R. 891) that—

> *the parties will by their attorneys appear in both the United States Court* and in the Circuit Court of Cole County and *join in seeking appropriate orders from such courts for distribution of impounded money* * * *. [Italics supplied.]

Here in explicit words the conspirators agreed upon a plan of joint *appearance in court* and joint application *there* for orders of distribution. Other language of the agreement is to the same effect, for example this (R. 892–893):

> The insurance companies will file amendments or supplements to their bills of com-

plaint or petitions setting forth the order of the Superintendent as herein contemplated, or take the appropriate means *to present to the courts in which proceedings are pending* this Agreement to settle the case upon payment of 20% to policyholders and the Superintendent will cause answer to be filed thereto or otherwise *appropriately confess* the same and *consent* to decrees for distribution of impounded moneys as herein indicated and confirming the agreement as to return and distribution of moneys as herein recited, and the parties will *mutually undertake to join in seeking orders or decrees* confirming their agreements. * * * [Italics supplied.]

This written agreement is conclusive evidence of petitioners' deliberate intention that there should be "misbehavior in the presence of the court." The filing of the subsequent motions for decree (R. 603–607) and stipulations (R. 607–609, 663), and of the supporting briefs (R. 960–964, 965–966, 967–977, 1008–1029), and the assurances and representations by counsel in open court (R. 52, 633, 680, 968, 969, 971, 974, 976–977, 984, 985, 987, 988, 990, 1006) in support thereof, were simply part and parcel of the prearranged plan. They were overt acts in furtherance of the conspiracy. Those acts were planned to occur, and they did occur, in the presence of the court, and constituted "misbehavior" *at that place.*

The conspirators, of course, intended that the natural and conventional procedure would be followed; that is, that the motions and stipulations would be presented to the court, not by petitioners in person, but by counsel of record for the parties; and this was done.

So it results that when in open court those counsel assured the court that the settlement was a genuine, good faith settlement by antagonistic litigants (R. 52, 633); that O'Malley had driven "as hard a bargain" as he could (R. 987); that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987), and had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976–967), whose representative or trustee he was (R. 964, 974); that he (O'Malley) thought the settlement was "clean, fine, and decent" (R. 987); and when counsel assured the court that the settlement was not only a "good settlement" (R. 990), but was "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and was, indeed, "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988)—when counsel made these representations to the court, those representations were in legal effect the representations of *all* the conspirators, Pendergast, Street, O'Malley, and

McCormack. The situation in legal effect was the same as if the conspirators had personally appeared before the judges and uttered them. The only difference in fact was that while counsel made the representations in ignorance of their falsity (R. 52), the conspirators *knew* that the settlement was corrupt with bribery and fraud and that the representations were wholly false.

Third. The false representations to the court were the representations of Pendergast and McCormack as well as those of O'Malley. The contempt thereby committed was the contempt of Pendergast and McCormack as well as that of O'Malley.

Petitioner Pendergast suggests (p. 30 of his brief) that he is not shown to have had knowledge of the "procedural steps intended to be taken." It is immaterial whether he had such knowledge or not. He did not need to concern himself with "procedural steps." He was one of the conspirators. He was the political boss who controlled O'Malley, and was in charge of the bribery of O'Malley. Even O'Malley did not need to know the procedure. He could leave that to his counsel. It was for O'Malley to direct his counsel. Pendergast obviously could not have directed counsel to take the procedural steps, for in such case counsel would have suspected that the settlement was probably corrupt and would not have recommended it to the court. In fact and in law the acts of O'Mal-

ley and his innocent counsel were the acts of Pendergast and McCormack.

An essential step in furtherance of the conspiracy was to obtain decrees directing distribution of the impounded millions. Indeed, from the standpoint of petitioners it was the most vital part of the conspiracy, because payment of the unpaid $650,000 balance of their $750,000 "fee" depended upon completion of a settlement "satisfactory" to Street (R. 704–706, 654).

Unquestionably Pendergast and McCormick are bound by the acts and representations of counsel in urging the corrupt settlement upon the court. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253–254; *United States* v. *Kissel*, 218 U. S. 601, 608. As held in these cases, "a conspiracy is a partnership in criminal purposes"; and an overt act by one partner is the act of all without any new agreement specifically authorizing it.

Where persons are jointly charged with the commission of an offense and are shown to be associated together to accomplish a common purpose, the act of one in promotion of the common purpose is in contemplation of law the act of all—and this without the necessity of alleging conspiracy in the commission of the offense. *St. Clair* v. *United States*, 154 U. S. 134, 149; *Coplin* v. *United States*, 88 F. (2d) 652, 660–661 (C. C. A. 9) and cases cited; *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8), and cases cited.

Petitioner Pendergast suggests (p. 30 of his brief) that the insurance companies might have dismissed their suits, and that upon dismissal the District Court would have been required to turn over the impounded funds to Superintendent O'Malley for distribution, citing *Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, 9, 10. That case dealt with a statutory review proceeding, not with an injunction suit challenging the constitutionality of the statutes; and so it has no application. Aside from that, the $10,000,000 was actually impounded, and if the conspirators were to achieve their goal they had to get it out of court. It is idle to speculate upon what other procedure they might have followed. They in fact chose a procedure which involved the perpetration of a fraud upon the court. Each conspirator is responsible for that fraud because it was perpetrated in furtherance of the conspiracy to which he chose to become a party.

Fourth. The decision in *Nye* v. *United States*, 313 U. S. 33, does not conflict with the decision below. Nye's misbehavior occurred at a place 100 miles away from the court, where he exerted undue influence upon the illiterate plaintiff Elmore to obtain the discharge of Elmore as administrator, and to send a letter to the district judge asking dismissal of Elmore's suit against the B. C. Remedy Company. The following distinctions differentiate that case from this:

(a) In the *Nye* case this Court in applying the statute construed only the phrase "so near thereto," and left untouched its previous construction of the phrase "in their presence." *Savin Petitioner*, 131 U. S. 267, 278; *Cooke* v. *United States*, 267 U. S. 517, 535; *Sinclair* v. *United States*, 279 U. S. 749, 765.[3] The case at bar involves only the phrase "in their presence."

(b) Nye overreached plaintiff *Elmore*, but *not* the court. In the case at bar petitioners committed a *fraud on the court*.

(c) No part of Nye's misconduct occurred in the presence of the court. The proceedings taken by the court were all for the purpose of avoiding the effect of the wrongs committed 100 miles away. In the case at bar the fraud on the court occurred *in open court*.

(d) Contrary to the erroneous assumption in the dissenting opinion (R. 1209, 1211) and petitioners' brief (p. 28), Nye did *not* appear in court by counsel in support of defendants' motion to dismiss the *Elmore* case. Nye was not acting in conspiracy with the B. C. Remedy Company, *who knew nothing of his contact with Elmore* (Nye Record, pp. 137, 148). Hence, when the B. C. Remedy Company through their own counsel filed and presented to the court their motion to dismiss

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[3] Justices Holmes and Brandeis, upon whose dissenting views in the *Toledo* and *Craig* cases petitioners here rely, concurred in the later *Cooke* and *Sinclair* cases.

the damage suit (Nye Record, pp. 7, 155), the appearance of those attorneys was not the act of Nye.[4] In the case at bar all of the petitioners, perforce of the conspiracy, were bound by counsel's false representations to the court.

(e) Nye's misconduct in causing plaintiff Elmore to write the letter to the judge asking dismissal of his damage suit occurred ten days before answer was filed (313 U. S. 33, 39; and see Nye Record, pp. 5–6, 7–8, 154). The Elmore damage suit could have been dismissed "*without order of court* by filing a notice of dismissal *at any time before service of the answer*" (Rule 41 of the Rules of Civil Procedure). Hence when Nye wrongfully induced Elmore to send the request for dismissal to the judge, no appearance in the presence of the court to obtain an order of dismissal was *necessary;* nor was it *contemplated,* so far as the Nye record shows. In the case at bar, Street, Pendergast, O'Malley, and McCormack unquestionably knew that appearance in court was necessary; they expressly *planned* for it, and they *caused* it.

(f) Petitioners say in their brief (p. 27) that the parallel with the Nye Case is "inescapable" because in the Nye Case "the innocent emissary was the *mailman;* in the instant case the innocent emissary was a *lawyer.*" Of course, there is a

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[4] The attorneys representing the B. C. Remedy Company (Nye Record, p. 6) were not the attorneys for either Nye or Mayers (Nye Record, pp. 15, 16, 20, 25).

fundamental distinction between the mailman, who had no function in court, and the attorneys, whose business it was to represent O'Malley in court. In fact, the mailman in the Nye Case got no further than the judge's *secretary*, to whom he delivered Elmore's letter (Nye Record, p. 143).

It is submitted that the *Nye* case is clearly distinguishable on its facts; and that the decision below is not in conflict.

Fifth. Petitioners argue that punishable contempt must disrupt quiet and order in the courtroom. They say the court has power only to punish for interruption of court proceedings by *noise*, and has no power to punish for interruption of normal procedure in a case by *false statements* fraudulently intended to influence the court to dismiss it without trial. Petitioners' theory is that irritation of the judge's *auditory nerve* by noise is punishable contempt, while fraudulent influence of the judge's *mind* by lies is not. This theory certainly is not supported by the words of the statute (Section 268 Judicial Code, 28 U. S. C., Sec. 385); nor does it accord with reason.

Petitioners rely on *Ex parte Robinson*, 19 Wall. 505, 511. In that case the only question actually determined was that disbarment of a lawyer was not such punishment as could be imposed for contempt. (Obviously that was true, because the statute limits punishment to "fine or imprisonment."). What is said about order and decorum is manifestly obiter dictum.

While the Robinson decision is referred to in the *Nye* case, the dictum is neither approved nor disapproved; it is simply mentioned as part of the history of judicial construction of the statute.

Later decisions of this court are opposed to the "order and decorum" dictum in the *Robinson* case. In *Savin, Petitioner,* 131 U. S. 267, the intimidation of the witness was furtive, and involved no disorder or breach of decorum; yet it was held to be punishable contempt; and this court expressly held (p. 278) that it was *unnecessary to consider whether it caused any disturbance of order in the court-room.* Plainly, disorder in the court-room was there held to be *not* an essential element. In *Cooke* v. *United States,* 267 U. S. 517, the sending of the scurrilous letter to the judge caused no disorder in the court-room; yet it was held to be punishable contempt. In *Sinclair* v. *United States,* 279 U. S. 749, the shadowing of jurors by Burns detectives certainly caused no disorder in the court-room; in fact, the detectives did their work so unobtrusively that the "court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed" (p. 759). Yet the shadowing of the jurors was held to be punishable contempt.

The *Savin, Cooke,* and *Sinclair* cases were cited in the *Nye* case, 313 U. S. 33, 48, 49, without any intimation of disapproval; and Mr. Chief Justice Stone said that he understood the opinion not to question them (pp. 55–56). These three decisions must certainly destroy the effect of the "order

and decorum" dictum in the earlier *Robinson* case, and any decisions which may have followed that dictum.

It is submitted that *any interruption* of the orderly conduct of a federal court's business, whether it be by noise and disorder in the presence of the court, or by deception and fraud in the presence of the court, is punishable contempt under the statute.

Sixth. The decision below is not in conflict with any decision of another Circuit Court of Appeals on the same matter.

In *Wimberly* v. *United States*, 119 F. (2d) 713, 714 (C. C. A. 5), Wimberly put in motion a train of events which led to an attempt by another person to influence a petit juror, at a place about sixty miles from the court. No part of the misconduct occurred in or near the court. Wimberly did not appear personally in court, nor did he cause anyone to appear for him. In that case nothing at all happened in court. The distinction is obvious. The lack of any conflict with the opinion in *Warring* v. *Colpoys*, 122 F. (2d) 642 (App. D. C.), certiorari denied, 314 U. S. 678, is manifest. These are the only decisions of other Circuit Courts of Appeals with which any conflict is claimed by petitioners.

The decision below properly held petitioners guilty of contempt for misbehavior in the presence of the court, and is not in conflict with any decision of this court, or with the decision of any other Circuit Court of Appeals.

II

PROSECUTION OF PETITIONERS UNDER THE INFORMATION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, OR BY LACHES; THE OPINION BELOW IN SO HOLDING IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT; NOR DOES THE OPINION DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Petitioners' contention on the question of limitation is not supported by the decisions of this court.

First. Limitation upon the time of beginning the prosecution of a criminal charge is purely a matter of statute. *United States* v. *Thompson,* 98 U. S. 486, 489; *United States* ex rel. *Jackson* v. *Meyering,* 54 F. (2d) 621, 622 (C. C. A. 7), certiorari denied, 286 U. S. 542. There is no statutory limitation specifically applicable to a proceeding for punishment of a criminal contempt committed in the presence of the court; and the opinion below so held (R. 1197–1200).

Petitioners say that the opinion in effect holds that there is no limitation at all. To the contrary, the opinion recognizes that unreasonable delay in instituting the proceeding, if *prejudicial* to the defendant, will bar the proceeding on the ground of laches (R. 1199–1200). The District Court also recognized this limitation (R. 30). It is applied by courts generally. 17 Corpus Juris Secundum, 83–84; 13 Corpus Juris 61. In *State* ex rel. *Wright* v. *Barlow,* 132 Neb. 166, 271 N. W. 282 (quoted by the opinion below, R. 1198–1199) the court said:

> * * * We have searched in vain for any statute limiting the time in which an

> action charging criminal contempt can be maintained, Therefore, unless there is a showing of special circumstances by which delay in instituting the suit has *prejudiced* the rights of the defendant, the action is not barred by lapse of time. [Italics supplied.]

Such prejudice could arise, for example, in case of death or disappearance of a witness who would probably exonerate the defendant. But there is no such case here. Petitioners make no pretense of prejudice by delay, and the opinion expressly finds that there was none (R. 1200).

This proceeding was not unreasonably delayed. The contemptuous character of petitioners' conduct "was not discovered until May, 1939, at the earliest," because it was concealed by petitioners (R. 1200).

Second. Petitioners invoke the three-year statute of limitations.[5] They rely upon *Gompers* v. *United States*, 233 U. S. 604, 612, which held that, "By analogy if not by enactment the limit is three years." However, that case dealt with violation of an injunction by acts "*not* committed in the presence of the court"; and this court was careful to warn that the holding should not be treated as ap-

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[5] "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed." (R. S., Sec. 1044; 18 U. S. C., Sec. 582.)

plicable to any other type of contempt saying (p. 606):

> * * * The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that *all that we have to say concerns* proceedings of this sort only, and further, only proceedings for such contempt *not committed in the presence of the court.* [Italics supplied.]

Thus the *Gompers* opinion distinguishes itself. In each opinion below there is a searching analysis of that decision (R. 28–30, 1197–1198).

Petitioners rely on *United States* v. *Goldman*, 277 U. S. 229, which also involved violation of an injunction, and did no more than follow the *Gompers* case. Petitioners cite Ex parte *Grossman*, 267 U. S. 87, which also involved violation of an injunction, but no question of limitation. It is submitted that the opinion below is not in conflict with any of these decisions.

Third. Assuming the three-year statute to be applicable to a criminal contempt in the presence of the court, as petitioners contend, this proceeding is not barred because the statute had not run when the information in contempt was filed.

The insurance rate cases, in which the contempt was committed, were undetermined and awaiting trial when petitioners fraudulently procured the decrees of distribution on February 1, 1936; and

the trials were in progress when the information in contempt was filed.

While the decrees provided for dismissal of the cases (R. 617), they further provided that "notwithstanding dismissal" the District Court expressly reserved power and authority, and retained jurisdiction (R. 623)—

> to make further orders in aid of distribution of impounded moneys, * * * *and to take any action deemed necessary to effectuate the purposes of this Decree. Jurisdiction over all persons or parties affected by this Decree is reserved for all purposes of effectuating this Decree.* [Italics supplied.]

Inasmuch as distribution of the impounded moneys never was completed (R. 735, 780), the cases remained alive under the court's reserved jurisdiction until May 29, 1939, when the court ordered the insurance companies to restore to the court's Custodian the moneys they had received under the decrees (R. 692, 633, 1061); and to show cause why the funds should not be restored to the policyholders (R. 757-758). Thereafter the court appointed a Special Master, who took a great mass of testimony as to the procuring of the decrees of distribution, and reported it to the court (R. 640-643). On May 20, 1940, oral arguments were heard, briefs were filed, and the issue of restoration to the policyholders was submitted (R. 643). On August 14, 1940, the court decided this issue by its final decrees directing restoration of the impounded

funds to the policyholders (R. 628–629).* The information in this contempt proceeding was filed on July 13, 1940 (R. 1). The net result is that the information was filed before the trials (on motions for final decrees directing restoration to policyholders) were completed by the entry of final decrees.

Jurisdiction to punish petitioners for contempt continued until the trials were finally terminated by the entry of those final decrees. Ex parte *Terry*, 128 U. S. 289, 311, 313; In re *Maury*, 205 Fed. 626, 631–632 (C. C. A. 9); In re *Cary*, 165 Minn. 203, 206 N. W. 402. Nor is it true, as petitioners say (p. 38 of brief), that this rule is merely applied to authorize delay of a contempt proceeding until the end of a trial "to avoid dislocation of actual trial processes." *Brown* v. *State*, 178 Okla. 506, 507, 62 Pac. (2d) 1208, 1209. In the *Brown* case the court said that—

> a reasonable amount of deliberation is to be *encouraged*, rather than *forbidden*. Such deliberation is calculated to promote an even and fair administration of justice in such cases. * * * [Italics supplied.]

Fourth. Since petitioners' contempt was committed by means of and was part of a conspiracy, the contempt itself partakes of the characteristics

* On July 10, 1942, the Circuit Court of Appeals filed its opinion affirming these decrees of restoration. *American Insurance Company* v. *Scheuffer*, No. 12092. (Not yet published.)

of conspiracy and is governed by the rules of law applicable thereto. Again assuming the three-year statute of limitations to be applicable, petitioners are unable to avail themselves of it as a defense because they continued the conspiracy and the contempt in force by overt acts committed within three years before the filing of the information. *Brown* v. *Elliott*, 225 U. S. 392, 400–401; *United States* v. *Kissel*, 218 U. S. 601, 607; *Hyde* v. *United States*, 225 U. S. 347, 369–370.

The information alleges and the evidence proves facts showing a conspiracy between petitioners and Street to accomplish a common unlawful purpose. *St. Clair* v. *United States*, 154 U. S. 134, 149; *Coplin* v. *United States*, 88 F. (2d) 652, 660–661 (C. C. A. 9), and cases cited; *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8), and cases cited. Petitioners do not challenge the sufficiency of the information; it unquestionably informed them of the nature of the charge (R. 1–9), and was sufficient. *Savin, Petitioner*, 131 U. S. 267, 279; *Randall* v. *Brigham*, 7 Wall. 523, 540; *Clark* v. *United States*, 61 F. (2d) 695, 699 (C. C. A. 8); *Kubik* v. *United States*, 57 F. (2d) 477, 479 (C. C. A. 8).

The conspiracy was a continuing conspiracy. The plot between petitioners and Street began, and O'Malley accepted his first bribe payment, in the spring of 1935 (R. 699–700, 703–710, 631, 651, 653 654, 662, 1123). The conspiracy took definite form in the written agreement of May 18, 1935 (R. 724,

725, 890–894, 662, 1118). In furtherance of the conspiracy the following overt acts were committed: On June 18 and 19, 1935, Street and O'Malley caused to be filed in court motions for decrees and stipulations designed to induce the District Court to enter decrees in conformity with the corrupt settlement (R. 603–606, 607–609, 663). On June 22 and October 26, 1935, and on January 24, 1936, Street and O'Malley caused their counsel to appear in open court and make false representations intended to induce the court to enter the decrees (R. 937–959, 978–1008, 1030–1045); and to file supporting briefs repeating the false statements (R. 960–964, 965–966, 967–977, 1008–1029). On February 1, 1936, Street and O'Malley succeeded in obtaining the decrees (R. 52, 617–624, 633, 680). About April 1, 1936, Street sent McCormack to Pendergast with $330,000 in cash, part of which was used to make a further bribe payment to O'Malley (R. 711–715, 663). In October or November 1936 Street sent McCormack to Pendergast with $10,000 more (R. 716–717, 782–785, 1123–1124, 1125).

During the next 28 months distribution of the fund proceeded under the decrees, but it was never fully completed (R. 733, 735, 780); nor did petitioners ever receive the $310,000 balance due on their "fee." So the two chief objects of the conspiracy (*full* distribution of the impounded fund, and *full* payment of petitioners' $750,000 "fee" therefrom) were never fully attained.

In February and March 1939 when the insurance settlement was under investigation by a federal grand jury, McCormack as a witness, on O'Malley's repeated and urgent requests (R. 719–722), committed affirmative acts of concealment by withholding from the grand jury the facts concerning the bribery, finally confessing the truth on March 17, 1939 (R. 717, 718, 719, 731).

These affirmative acts of concealment to keep the bribery secret were unquestionably part and parcel of the conspiracy; for the conspirators in reason knew if the bribery became known the court would promptly set aside the decrees—as the court in fact did (R. 633, 692, 756–758, 1061)—and the conspiracy would fail. Consequently all details of the bribery were handled by the conspirators with the utmost caution and secrecy (R. 706–717, 663, 1123–1125).

So it results that O'Malley's importunements of McCormack, and McCormack's denials of the bribery before the grand jury, were *overt acts in furtherance of the conspiracy.* That they were such is plainly to be inferred from all the circumstances. *Glasser* v. *United States,* 315 U. S. 60, 80; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 612; *The Wenona,* 19 Wall. 41, 58. Inferences from proven facts may be drawn by judges sitting as triers of the facts just as jurors may draw them. *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 407; *Hyde* v. *Booraem & Co.,* 16 Pet. 169, 176.

These overt acts were committed in February and March 1939 (R. 718, 719, 731)—only 16 months before the information in contempt was filed (R. 1). Therefore three years had not passed when this proceeding began. *Brown* v. *Elliott*, 225 U. S. 392, 400–401; *United States* v. *Kissel*, 218 U. S. 601, 607; *Hyde* v. *United States*, 225 U. S. 347, 369–370.

The fact that the last overt acts were not committed by O'Malley and McCormack in the presence of the court is not a material factor. Those acts were parts of a single continuing conspiracy, which was carried out partly in court and partly out of court. A similar situation existed in *Sinclair* v. *United States*, 279 U. S. 749, 765, where the acts complained of (the shadowing of jurors) were "within the court room, near the door of the court house, or within the city"—yet all the acts were treated as parts of one contempt.

The case here is analogous to the case of a conspiracy entered into in one venue and carried into effect by overt acts in different venues. The Sixth Amendment requires that the accused in a criminal case be tried in the district "wherein the crime shall have been committed." Yet in such cases all the overt acts are treated as parts of a single offense, punishable in any venue where an overt act was committed. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 250–254; *Brown* v. *Elliott*, 225 U. S. 392, 400; *Hyde* v. *United States*, 225 U. S. 347, 363–367. Such a crime is regarded

as having been committed in each venue where any overt act was committed.

Not until 80 percent of the impounded funds were fully distributed to the insurance companies and the $750,000 "fee" was fully paid by Street and divided between petitioners, would petitioners' conspiracy have been fully carried out. Then, and not until then, would the conspiracy reach full fruition. This stage had not been reached in May 1939 when the facts were first brought to the attention of the District Court (R. 747–755). In that connection the District Court in its opinion said (R. 61):

> * * * The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants *commenced*. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, 1935, should exert its effect *continually thereafter*. So long as the deception continued to deceive—and it did that until early in 1939—the misbehavior continued. The misbehavior here was the planting of a lie in the minds of the

> judges and in the records of the court, a lie whose emanations—like the baleful emanations of radium—would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a bomb in his victim's residence which will explode in a month, when does the statute of limitations begin to run—when he plants the bomb, or when it does its devastating work? If a criminal plants in another's house some receptacle of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then. [Italics supplied.]

Fifth. Petitioners' contention that this proceeding was barred by laches is manifestly untenable. Mere delay in instituting the proceeding could not constitute laches, unless the delay was *prejudicial* to petitioners; and they were in fact not prejudiced by the delay (R. 1199–1200). It was petitioners' concealment of the contempt which prevented discovery of it by the court until May 1939 (R. 1200, 30).

The rule that a criminal contempt should be promptly dealt with is well enough when the contempt consists of a disturbance of order, or violation of a court decree, known to the public. Prompt action in such a case is necessary to pro-

tect the authority and uphold the dignity of the court. But such rule manifestly cannot apply to a contempt consisting of a fraud on the court accompanied by *careful concealment of the fraud* by the contemners. The opinion below properly held the defense of laches to be without merit (R. 1200). 17 Corpus Juris Secundum 83–84.

The decision below, both on the question of limitation and laches, is plainly right, and is in harmony with applicable decisions of this court.

III

THE PROSECUTION FOR CONTEMPT IS NOT IN VIOLATION OF ANY AGREEMENT; THE OPINION BELOW IN SO HOLDING IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT; NOR DOES THE OPINION DECIDE ANY QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The contention of petitioners Pendergast and O'Malley, that the prosecution for contempt is in violation of agreement, is not supported either by the facts or the law. The opinion below so held (R. 1201).

First. The pertinent facts are stated by the District Court (R. 63–65, footnote) and by the Circuit Court of Appeals (R. 1201). When Pendergast and O'Malley pleaded guilty to charges of tax evasion their attorneys said nothing about any agreement; and neither they nor Judge Otis accepted the District Attorney's theory (R. 842–843) that in passing sentence for tax evasion other crimes could and would be taken into consideration. On the contrary, the attorneys insisted that Judge

Otis properly could consider *only* the tax evasion charge (R. 64; and see 28 F. Supp. 601). Judge Otis agreed with this insistence, and in passing sentence said (*United States* v. *Pendergast*, 28 F. Supp. 601, 605):

> When a defendant has been charged with a given crime and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged, *and that only.* If the crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion. * * * [Italics supplied.]

Petitioners having successfully maintained that position then, it would be an incongruous miscarriage of justice if now they were permitted to wheel about and to so construe the "agreement" as to escape punishment for contempt. Certainly they are in no position to invoke any supposed "equitable rights."

That Judge Otis did not understand that prosecution for contempt was precluded by "agreement" is conclusively shown by his opinion in the tax evasion cases, which said (28 F. Supp. 601, 612):

> * * * Judicial notice is taken of the fact that the United States Attorney for this district has been directed by a Three-Judge Federal Court to secure indictments, if the evidence available should warrant, charging all persons, if there are any, who participated in any criminal way in bringing about the compromise of the insurance cases with

> the crime of obstructing the administration of justice in the courts of the United States. The United States Attorney also has been directed by the same Three-Judge Court to institute *contempt proceedings* against any person or persons believed by him, after investigation, to be guilty of contempt of court. Judicial notice is taken of the fact that the two last mentioned matters *may involve these two defendants* (meaning Pendergast and O'Malley). [Italics supplied.]

The District Attorney evidently intended his agreement to cover criminal prosecutions within his control; and he kept his agreement in good faith when he directed dismissal (R. 852–854, 857–858) of the indictments for conspiracy to obstruct justice (R. 821–829) and to defraud the United States (R. 830–836). He evidently did *not* understand his agreement to cover prosecution of a proceeding for contempt in the presence of the three-judge court. This seems clear from the fact that, only two days after the plea of guilty and sentence for tax evasion (R. 868, 1055), he agreed to comply with the three-judge court's request that he investigate grounds for a possible contempt proceeding (R. 1062; 64, footnote).

The three-judge district court, against which the contempt was committed, was not consulted or informed regarding the "agreement," as its opinion explicitly attests (R. 63–65, footnote). Two of the judges composing that court, Judge Stone and

Judge Reeves, had no connection with the tax evasion or conspiracy cases and no notice of proceedings therein. The three-judge court knew nothing of the "agreement" until the District Attorney's telegram, which had directed dismissal of the conspiracy cases pending before Judge Wyman, was made part of the record at the trial of the contempt proceeding (R. 63, 837, 838–839, 852–853, 1201). Clearly the facts do not support petitioners' position.

Second. Petitioners' contention is not supported by the law. The three-judge court was charged—as is every federal court—with the high function, power and duty to protect the integrity of its own proceedings; and to do so *independently* of any and every other official body, in its own *independent* proceeding. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 330–331; Ex parte *Terry*, 128 U. S. 289, 303. This is so far true that a court may punish for contempt committed in its presence, upon its own knowledge and without formal information or trial. *Cooke* v. *United States*, 267 U. S. 517, 534–535; Ex parte *Terry* 128 U. S. 289, 307–309; in re *Debs, Petitioner*, 158 U. S. 564, 595.

The District Court and the District Attorney each represent the United States. Their respective powers are fixed by law, are independent, separate and distinct, and do not overlap; and neither has lawful power to invade the other's field of authority. The District Attorney therefore had no power

or authority, real or apparent, by any form of agreement he might make with petitioners in the tax evasion cases, to bargain away the inherent power of the court, in its own independent proceeding to vindicate the integrity of its judicial decrees by punishment for contempt.

Petitioners were charged with knowledge of the lawful authority of public officials. *Whiteside* v. *United States*, 93 U. S. 247, 257; *Hawkins* v. *United States*, 96 U. S. 689, 691; compare *United States* v. *Mayer*, 235 U. S. 55, 70. In the tax evasion cases petitioners were dealing, not with a private agent with unknown powers, but with a public official having *known* powers. Petitioners knew that a contempt proceeding was within the control of *the court contemned*. They knew that the District Attorney had no power to forgive their contempt or relieve them of the liability to answer at the bar of the court whose proceedings they had defiled. The lack of his authority is clear. *United States* v. *Ford*, 99 U. S. 594; *State* v. *Guild*, 149 Mo. 370, 50 S. W. 909.

The District Attorney does not control a proceeding for criminal contempt; it may be prosecuted by attorneys in the civil suit out of which the contempt proceeding arises (*Phillips Sheet & Tin Plate Co.* v. *Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 344 (S. D. Ohio), and cases cited), or by an attorney appointed by the court (17 Corpus Juris Secundum 79).

Petitioners stress the fact that this proceeding was filed by the Acting District Attorney and is entitled in the name of the United States. The mere style of the proceeding is not important, and there is no uniformity in the practice in that regard. It may be entitled either in the name of the United States, or be entitled "*In re* (name of respondent)." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446; Ex parte *Terry*, 128 U. S. 289, 297–299; In re *Fox*, 96 F. (2d) 23, 25 (C. C. A. 3); *Phillips Sheet & Tin Plate Co.* v. *Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 343–344 (S. D. Ohio); 17 Corpus Juris Secundum 85–86. The District Attorney was under no duty to prosecute this proceeding, and the court in fact requested the Acting District Attorney, as amicus curiae, to prosecute it (R. 75). That the Acting District Attorney filed the information and that it named the United States as plaintiff cannot have the effect of vesting in the District Attorney authority which the law did not give him.

Petitioners' contention plainly is not supported either by the law or the facts.

IV

THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THE CONTEMPT PROCEEDING; AND THE DECISION OF THE CIRCUIT COURT OF APPEALS IN UPHOLDING SUCH JURISDICTION, AND IN FURTHER HOLDING THAT IN ANY EVENT THE PRESENCE OF THREE JUDGES DID NOT AFFECT THE DISTRICT COURT'S JURISDICTION, IS IN HARMONY WITH APPLICABLE DECISIONS OF THIS COURT.

Jurisdiction of the three-judge court in the insurance rate litigation, sustained below (R. 1202–

1206), is no longer in dispute. However, since petitioners were convicted of a contempt of that court, committed while it was exercising its jurisdiction in that litigation, it is pertinent to state what that jurisdiction was.

That jurisdiction was determinable by the allegations in the bills. *Moshe* v. *City of Phoenix*, 287 U. S. 29, 30; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 324.

The insurance rate cases clearly were three-judge cases, because the insurance companies had applied for interlocutory and permanent injunctions restraining enforcement of state statutes for alleged unconstitutionality; they had sought to forestall the general policy of the state in the regulation of insurance rates, the validity of which they had challenged (R. 382–399, 404–412, 420–421, 432, 436–437, 460–470, 472–475, 485–487, 490–497).[7] The companies had pressed their applications for interlocutory injunctions (R. 501–508). The cases thus fell literally within the provisions of the three-judge statute, Section 266 of Judicial Code, 28 U. S. C., Sec. 380; and the three-judge court had jurisdiction therein. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 333; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 292; *Herkness* v. *Irion*, 278 U. S. 92, 93–94.[8] While the case of *Phillips* v.

[7] The statutes assailed are copied in the appendix to this brief.

[8] The Superintendent of the Insurance Department is "an administrative board or commission" within the meaning of

United States, 312 U. S. 246, is distinguishable on its facts, because there the validity of no state statute was involved, the definition in that case of the scope of the three-judge statute (p. 253) supports jurisdiction here.

The three-judge court below, having jurisdiction to grant or refuse an interlocutory injunction, had jurisdiction to grant it upon the condition that the insurance companies impound in court that part of the premiums in dispute (R. 501–508). In determining that condition the court determined a question involved in the litigation pertaining to the prayer for injunction which the court was convened to hear. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.,* 312 U. S. 621, 625 (footnote 5); *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 391; *Sterling* v. *Constantin,* 287 U. S. 378, 393–394. The impounding condition is conventional in rate cases, courts usually regarding the public as better protected by a deposit than by a bond. *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.,* 253 Fed. 638, 640–641 (C. C. A. 5); *San Francisco Gas & Elec. Co. v. City and County of San Francisco,* 164 Fed. 884, 893 (C. C. N. D. Cal.).

Jurisdiction to require the premiums to be impounded automatically imposed upon the court the

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the three-judge statute. *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 320; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 333.

correlative duty to distribute the fund to those entitled thereto. *United States* v. *Morgan*, 307 U. S. 183, 193–194, 197–198; *American Constitution Fire Assurance Co.* v. *O'Malley*, 342 Mo. 139, 113 S. W. (2d) 795. So it logically results that the three-judge court's decrees of February 1, 1936, ordering distribution (the decrees which petitioners fraudulently procured) were incidental to the court's jurisdiction to grant or refuse the injunctive relief prayed. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621, 625, footnote 5, and cases there cited.

Petitioners' contention that the three-judge court had no jurisdiction to entertain the contempt proceeding is without merit, because:

First. The contempt consisted in a fraudulent misuse of the authority of *that court*. The false representations which induced the decrees were made to *that court;* and that court had jurisdiction to punish the contempt "without referring the issues of fact or law to another tribunal." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 330–331; Ex parte *Terry*, 128 U. S. 289, 303.

Second. While a three-judge court in granting injunctive relief has a limited jurisdiction (*Phillips* v. *United States*, 312 U. S. 246; *Public Service Commission of Missouri* v. *Brashear Freight Lines*, 312 U. S. 621; Ex parte *Bransford*, 310 U. S. 354), that does not answer the question here. When in

an injunction suit, which is *within* its limited jurisdiction, a three-judge court is induced by fraud, committed in its presence, to enter decrees, it has the *inherent* jurisdiction, upon discovery of the fraud, to protect the integrity of its proceedings in that suit by punishment for contempt. It is not so feeble and helpless that it must look to or wait upon some other tribunal to vindicate its lawful authority.

While the contempt proceeding was not a part of the insurance rate cases (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445; *Michaelson* v. *United States*, 266 U. S. 42, 64), nevertheless it grew out of and was incidental to those cases, and the court necessarily had jurisdiction to protect the integrity of its proceedings therein by punishment for contempt. This is true of *all* courts, *whether sitting in equity or at law*. The three-judge court was constituted, and was exercising judicial authority, as a court of the United States (Sec. 266 of Judicial Code, 28 U. S. C., Sec. 380). *All* courts of the United States inherently possess the power to punish for contempt. *Michaelson* v. *United States*, 266 U. S. 42, 65–66; *Myers* v. *United States*, 264 U. S. 95, 103; In re *Debs, Petitioner*, 158 U. S. 564, 595; *United States* v. *Hudson*, 7 Cranch 32, 34; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; Ex parte *Robinson*, 19 Wall. 505, 510.

Third. The three-judge court also had *statutory* power to punish for contempt, expressly conferred by Section 268 of Judicial Code, 28 U. S. C., Sec.

385, providing that *"The courts of the United States shall have power* * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * *." This language embraces *all* courts of the United States. Congress has not see fit to except three-judge courts.

Fourth. Petitioners say that in dismissing their direct appeals this court "indicated" that the three-judge court was without jurisdiction in the contempt proceeding. *Pendergast* v. *United States,* 314 U. S. 574. This court's comment was there made incidentally, in passing upon a motion to dismiss appeals, without the question having been fully presented and argued; and with great respect we submit that this court should not treat it as decisive of the question now presented upon the full record.

Fifth. Even if it were mistakenly assumed that the contempt charge should be passed upon by three judges, this did not invalidate the district court's judgment in the contempt proceeding. The participation of Judges Stone and Otis with Judge Reeves, who initially had jurisdiction of the insurance rate cases (R. 1155–1160), did not prejudice petitioners or invalidate the judgment. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.,* 312 U. S. 621, 626; *Healy* v. *Ratta,* 67 F. (2d) 554, 556 (C. C. A. 1); *Cannonball Transportation Co.* v. *American Stages, Inc.,*

53 F. (2d) 1050 (S. D. Ohio). Compare *Clark* v. *United States*, 61 F. (2d) 695 (C. C. A. 8), where two judges sat in a contempt proceeding (p. 698) and the conviction was affirmed. Judge Reeves, with Judge Stone and Judge Otis, heard and determined the contempt charge and rendered judgment thereon (R. 31, 32, 65–66, 74, 75, 145–146, 193–194, 232, 293–294, 346–348, 348–910, 919–924, 936, 1153, 1178–1179, 1184–1186). The three judges certify that the judgment and each ruling made in the contempt proceeding embodied their unanimous decision (R. 1154).

The circuit court of appeals' decision in upholding jurisdiction of the district court (R. 1202–1206) is in full conformity with applicable decisions of this court.

CONCLUSION

The petitions for certiorari should be denied because the case was correctly decided below, and petitioners present neither a conflict of decisions nor a question of general importance not heretofore settled by this court. Plainly it is in the interest of justice that these guilty men should not escape punishment.

Respectfully submitted.

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AUGUST 1942.

APPENDIX

Following are the sections of the Revised Statutes of Missouri, 1919, which were challenged as unconstitutional by the insurance companies in the insurance rate cases (R. 382–399, 404–412, 420–421, 432, 436–437, 460–470, 472–475, 485–487, 490–497):

SEC. 6270. *Public rating record to be maintained—contents thereof—analysis of rate to be furnished policyholder.*—Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the

make-up of such rate. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

* * * * *

SEC. 6274. *Public rating records to disclose correct rate—rates may be changed—notice of increase necessary—copies of all rating records to be filed.*—All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: *Provided*, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance

covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

* * * * * *

SEC. 6281. *Companies to report premiums, losses, expenses and earnings on unearned premiums.*—Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses, it shall separately state its disbursements and expenses for:

(a) Commissions paid to agents.
(b) Salaries paid.
(c) Taxes paid.
(d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed, regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire in-

surance laws of Missouri as if they were originally commissioned agents therefor. (Laws 1915, p. 313.)

* * * * *

SEC. 6283.[9] *Superintendent to investigate reasonableness of rates—may regulate rates charged.*—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or

[9] As amended, Laws 1923, p. 235.

not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

* * * * *

SEC. 6287. *Penalties for violation.*—The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: *Provided,* that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed

five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

* * * * *

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license—notice.*—If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large

and general circulation in the state: *Provided, however*, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. (R. S. 1909, Sec. 7043.)

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